Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Cable Television Consumer Protection And Competition Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity In Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF CAROLINA BROADBAND, INC.

Carolina BroadBand, Inc. ("Carolina BroadBand"), by its counsel, and pursuant to the Commission's October 18, 2001 Notice of Proposed Rulemaking, hereby submits its Comments in the above-captioned proceeding.

Carolina BroadBand is a facilities-based Broadband Service Provider ("BSP") that competes with incumbent providers in the multichannel video programming distribution ("MVPD") market. Specifically, Carolina BroadBand offers Carolina residents and small businesses a choice in providers for broadband multi-media service, including bundled cable TV, high-speed Internet service and local and long-distance telephone services. Carolina BroadBand's state-of-the-art technology significantly increases the bandwidth running into customers' homes and businesses, providing the highest possible quality in cable TV, Internet service and local and long-distance telephone service.

Carolina BroadBand's service offerings include up to 250 digital television channels, with the highest picture and sound quality available; "video on demand" with "video store" selections and full VCR-like functionality; interactive television service that allows for web browsing while viewing regular television programming; Internet access and data connectivity at up to 100 times dial-up connection speeds; a full range of local and long-distance digital telephone services; real-time video conferencing and work sessions; and streaming video and audio capability.

Introduction

The Commission has consistently noted that in enacting the program access rules, Congress sought to address the competitive imbalance that exists between incumbent cable operators and new entrants. Specifically, Congress was concerned that cable operators enjoyed a monopoly in program distribution at the local level, and concluded that exclusive contracts between vertically integrated programming vendors and cable operators served to inhibit the development of competition among distributors, potentially resulting in lack of diversity in the distribution of video programming.[1] The prohibition on exclusivity set forth in Section 628(c)(2)(D)[2] of the Communications Act was one measure adopted by Congress to address this imbalance. While Congress envisioned a time when this prohibition on exclusivity would no longer be necessary, that time has not come. Indeed, today, nearly a decade after Section 628(c)(2)(D) was promulgated, the justifications for its continued viability are more compelling than ever. The last few years have been marked by extraordinary industry consolidation (AT&T/TCI, AT&T/Media One, AOL/Time Warner, the proposed merger between EchoStar and Direct TV), resulting in both content and distribution coming under the control of a decreasing number of providers, and thus increasing the potential for competitive abuses and

1 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition,* CS Docket No. 01-290, Notice of Proposed Rulemaking, ¶ 2 (rel. Oct. 18, 2001).

2 47 U.S.C. § 548(c)(2)(D).

lack of diversity in video programming distribution – precisely the harms Congress sought to prevent through its program access rules. This fact, coupled with the loophole of Section 628(c)(2)(D), *i.e.* that the FCC has interpreted its language to apply only to satellite-delivered programming, have resulted in significant barriers to competitive entry in the distribution of video programming. The sunset of Section 628(c)(2)(D) would make these barriers virtually insurmountable. Section 628(c)(2)(D) should be maintained.

I. Section 628(c)(2)(D) Should Continue to Be Effective Until Such Time as the Potential for the Competitive Abuses Leading to its Enactment are Eliminated

Section 628(c)(2)(D)'s prohibition on exclusivity is critical to competitive entry into the video programming distribution market, and the Commission should continue its effectiveness until such time as the competitive concerns that originally led Congress to enact the provision are eliminated. In its *First Report and* Order, the Commission recognized that "[t]he program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors."[3] Moreover, the Commission noted that the "1992 Cable Act and its legislative history, reflect congressional findings that horizontal concentration in the cable television industry, combined with extensive vertical integration (i.e. combined ownership of cable systems and suppliers of cable programming), has created an imbalance of power . . . between incumbent cable operators and their multichannel competitors."[4] Accordingly, the answer to the question of whether 628(c)(2)(D) should continue to be effective necessarily hinges on whether incumbent cable operators continue to exercise the

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3 *Implementation of Sections 12 and 19 of the Cable Television Protection and Competition Act of 1992:Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 21 (1993) ("*First Report and Order*").

4 *Id.*

degree of market power that prompted its enactment, including whether adequate diversity exists in the distribution of video programming.

There can be no question that in the MVPD market, lack of fair and reasonable access to programming will inexorably lead to the failure of competition. It has consistently been demonstrated that programming is the single most important factor that viewers consider when selecting an MVPD provider, in the few areas where competitive alternatives exist. Absent access to programming, particularly "marquee" programming such as local sports, viewers will simply not switch to a competitor. If competitors are unable to attract viewers, they will be unable to attract advertising revenues, which, in turn, will result in competitors lacking adequate financing and ultimately to insolvency. In short, if incumbent cable providers are permitted to use their market dominance to inhibit competitors access to programming, competitors will be unable to survive.

In its *Seventh Annual Report* released this year, the Commission expressly stated that cable providers continue to be dominant with respect to the delivery of video programming to consumers in the MVPD market,[5] and the statistics revealed in that report removed any doubt. Not only do cable providers continue to control 80% of all MVPD subscribers, a figure that would constitute dominance under any traditional standard, but that number in itself is misleading. Indeed, the fact that cable providers control only 80% of MVPD subscribers is attributable in substantial part to an increase in MVPD subscribership as a whole, particularly in areas unserved or underserved by cable providers, rather than from any significant penetration of the market share of such cable providers in their service territories.[6]

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5 *Seventh Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-1, CS Docket No. 00-132, ¶ 5 (rel Jan. 8, 2001) ("*Seventh Annual Report*").

6 *Id.* at ¶ 138.

Moreover, the Commission stated that the "market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry . . . includ[ing] strategic behavior by an incumbent designed to raise its rival's costs, e.g., limiting the availability of certain popular programming from rivals."[7] Finally, and perhaps most importantly, of the 281 satellite delivered national programming networks, 99 or 35% are vertically integrated with cable operators (primarily the largest ones), with the 99 vertically integrated programming networks representing the satellite programming networks with the largest number of subscribers.[8]

In view of the statistics elucidating cable companies' market dominance, the potential for devastating anti-competitive harm absent Section 628(c)(2)(D)'s prohibition on exclusive contracts becomes apparent. Specifically, if the prohibition on exclusive contracts were to lapse, cable providers could immediately take steps to limit their competitors' access to critical programming, *i.e.*, they could enter into exclusive arrangements with the satellite programming networks with whom they are vertically integrated, thereby effectively removing the programming of 35% of the satellite delivered national programming networks – the 35% with the largest subscribership – from the reach of their competitors.

Such a result can hardly be characterized as a parade of horribles. The Commission has already found that incumbent cable providers make concerted efforts to limit the availability of popular programming to their competitors.[9] Moreover, the mere possibility of this result is enough to deter investment. New entrants into the MVPD market already face significant barriers to entry, as their primary competitors are incumbent cable providers, who enjoy all of

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[7] *Id.* at ¶ 137.

[8] *Id.* at ¶¶ 172 – 175.

the advantages traditionally associated with incumbency – name recognition, substantial resources, an embedded customer base, strong community relationships, franchises and other municipal licenses, etc. Absent statutory and regulatory constraints that to some extent level the playing field, or at least minimize the potential for anti-competitive abuses, new entrants will invariably either be deterred from attempting to enter the market, or will be unable to obtain access to the necessary financing due to the unlikelihood of success.

The implications of this market dominance cannot be understated. Not only do a handful of the largest cable providers exercise direct control over a third of all satellite delivered national programming networks (those with the largest subscriber base), but due to their monopsony power, they also exercise undue influence over the remaining two thirds of such programming networks. Indeed, satellite delivered national programming networks depend on distribution arrangements with incumbent cable providers to disseminate their programming, since the cable company's subscribers comprise 80% of the total programming market. Given that the Commission's vertical and horizontal ownership limits are hanging in the balance,[10] elimination of Section 628(c)(2)(D)'s prohibition on exclusive contracts at this time would have severely detrimental effects on competition in the MVPD market, as incumbent cable providers could enter into exclusive arrangements with satellite programming vendors with whom they are vertically integrated, could exert increasing market power over the rest of the industry due to their monopsony power, and, subject to the ultimate resolution of the horizontal and vertical ownership limits, could potentially acquire significantly greater interests in the total number of

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[9] *Id.* at ¶ 137.

[10] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996: The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules*, Further Notice of Proposed Rulemaking, FCC 01-263 (rel. Sep. 21, 2001).

channels and subscribers. Such market dominance would leave little room for new entrants, who would not only be faced with the prospect of competing with entrenched behemoths, but would now have to do so without the minimal statutory and regulatory protections that were previously in place, and without the ability to deliver many of the programs their customers want.

Some commenters may argue that the Commission can always utilize its enforcement mechanisms to remedy such anti-competitive tactics on the back end. Such an approach, however, not only fails to take into account the fact that anti-competitive tactics are often a matter of subtle degree and not easily demonstrable, but also that the cost and delay associated with enforcement often render enforcement an inadequate remedy, even where the complaining party prevails. For competition and diversity in the MVPD market truly to exist, the Commission must adopt and maintain policies, such as Section 628(c)(2)(D)'s prohibition on exclusive agreements, that level the playing field between incumbent cable providers and new entrants.

II. The Commission Should Ask Congress to Amend Section 628(c)(2)(D) to Provide that its Prohibition on Exclusive Contracts Applies Irrespective of the Manner in Which Programming is Distributed

For several years, new entrants have cautioned the Commission that absent an interpretation on the part of the Commission to the contrary, Congress' program access rules can easily be circumvented by incumbent cable providers through the so-called "terrestrial migration" of previously satellite delivered programming to terrestrial delivery.[11] By way of background, in its *Program Access Order*, the Commission, believing that it was constrained by the language of Section 628(c)(2)(D), declined to extend the scope of the provision to terrestrial

[11] *See, e.g., RCN Telecom Service of New York, Inc. v. Cablevision Systems Corp., et.al*, Memorandum Opinion and Order, FCC 01-127 (*rel.* May 30, 2001) (*"RCN Decision"*).

delivered programming,[12] a decision which the Commission has maintained in subsequent decisions.[13]

Carolina BroadBand submits that the Commission should recognize that in drafting the language of Section 628(c)(2)(D), Congress did not intend to create a loophole that would allow vertically integrated cable providers to circumvent its program access rules. Rather, the language of Section 628(c)(2)(D) merely reflects the reality at the time of its adoption that satellite transmission was required for the distribution of cable programming. Congress' stated intention in adopting its program access rules was to promote competition and diversity in the distribution of video programming.[14] If the Commission does not believe that the plain language of Section 628(c)(2)(D) provides it with the latitude to apply the statute to terrestrial delivered programming, Carolina BroadBand urges the Commission to request that Congress amend the statute to specifically include terrestrial delivered programming. An untenable result, however, is for the Commission to adopt an interpretation of Section 628(c)(2)(D) that enables cable operators to easily circumvent it, thereby frustrating Congress' very purpose in enacting Section 628(c)(2)(D).

In its *Program Access Order*, the Commission noted that if a trend developed where vertically integrated programmers began to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules, it would consider an appropriate response to

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12 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, RM No. 9097, Report and Order, 13 FCC Rcd 15822, 15856 ¶¶ 70-71 (1998) ("*Program Access Order*").

13 *See RCN Decision; See also DIRECTV v. Comcast*, 13 FCC Rcd 21822 (1998); *EchoStar v. Comcast*, 14 FCC Rcd 2089 (1999).

14 *See* House Comm. On Energy and Commerce, House Rep. No. 102-268, 102d Cong., 2d Sess. at 42 (1992); Senate Comm. on Commerce, Science, and Transportation, S. Rep. 102-92, 102d Cong., 1st Sess. at 25-26 (1991).

ensure continued access to programming.[15] As a preliminary matter, it is difficult to imagine more egregious facts than those presented in some of the cases the Commission has considered to date, and that has not resulted in a change in the Commission's interpretation or enforcement. More importantly, however, is the fact that the Commission has erected a standard which is virtually impossible to meet. It is rarely the case that an incumbent cable provider's conduct could be shown to be designed solely "for the purpose of evading the Commission's rules." Indeed, in the case of terrestrial migration, there are always alternative justifications, *i.e.*, terrestrial delivery over fiber optic cable is more reliable, and the cost associated with such delivery is decreasing. The end result is a boon for cable providers – not only do they avail themselves of a lower cost and more reliable method of video programming distribution, but through terrestrial delivery they are also able to circumvent the program access rules, thereby shielding essential programming from access by their competitors. Such a result cannot be reconciled with Congress' stated goal of promoting competition and ensuring diversity in the MVPD market.

[15] *Program Access Order* at ¶ 71; *See also Seventh Annual Report* at ¶ 182.

Conclusion

For the foregoing reasons, Carolina BroadBand urges the Commission to: 1) extend the effectiveness of Section 628(c)(2)(D) until such time as the potential for the competitive abuses that led to its enactment are eliminated; and 2) ask Congress to amend 628(c)(2)(D) to provide that its prohibition on exclusive contracts applies irrespective of the medium through which programming is delivered.

Respectfully submitted,

Christopher Rozycki
Vice President, Regulatory Affairs
Carolina BroadBand, Inc.
9201-H Southern Pines Blvd.
Charlotte, NC 28273
(704) 973-4009 (phone)
(704) 973-4001 (fax)

Dana Frix
Kemal Hawa
O'Melveny & Myers LLP
1650 Tysons Boulevard
McLean, VA 22102
(703) 287-2400 (phone)
(703) 287-2404 (fax)

Counsel for Carolina BroadBand, Inc.